Filed 10/31/12 Bowen v. Superior Court CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MARK BOWEN, an Incompetent person, etc.,

Petitioner,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

COUNTY OF RIVERSIDE et al.,
Real Parties in Interest.

E055341

(Super.Ct.No. RIC516303)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Jacqueline C. Jackson, Judge. Petition granted in part; denied in part.

Hosey & Bahrambeygui, Patrick L. Hosey; Boudreau Williams and Jon R. Williams for Petitioner.

No appearance for Respondent.

Smith Mitchellweiler, Douglas C. Smith; Arias & Lockwood and Christopher D. Lockwood for Real Parties in Interest.

INTRODUCTION

Petitioner Mark Bowen (plaintiff), by and through his guardian ad litem, is the plaintiff in a personal injury action in which he seeks recovery for injuries allegedly inflicted by law enforcement officers. In the proceedings leading to this petition, the trial court granted summary adjudication in favor of real parties in interest County of Riverside (defendant County) and four of its deputies[1] on a cause of action asserting a federal civil rights claim.[2] (42 U.S.C. § 1983 (section 1983).) The trial court rejected the deputies' claim (and by extension that of defendant County) that they used reasonable

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[1] Patrick Mushinskie, Robert Mills, Brian Herian, and Joseph Sabolchic will be referred to simply as "deputies."

The trial court also granted summary judgment as to all causes of action with respect to two deputies who were not physically involved with the altercation with plaintiff, although they were present. Plaintiff does not provide any specific argument with respect to these deputies in the petition. We deem any error in this ruling to have been waived.

[2] Plaintiff asks for extraordinary relief because "this case has already been pending for nearly three years, [and] *has already been lengthy and expensive to litigate to this point*." (Italics added.) We might say, "Physician, heal thyself," (Luke 4:23) as we note, for example, that plaintiff's response to defendants' "Separate Statement" weighs in at well over *500 pages*. (On the other hand, among defendants' almost 200 "material" undisputed facts are dozens of "material" facts reciting a blow-by-blow account of the encounter with plaintiff.) Many of the responses—which generally run for several pages—merely repeat over and over the same collection of evidentiary facts and argumentative assertions. While we appreciate that attorneys may enjoy bombarding each other with paper, the burden on the courts from instances of excess is being increasingly recognized as a "disturbing trend." (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532, citing *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 248, 254 & fn. 3.) We do not wish to be overly harsh on the parties however— in *Nazir* the plaintiff presented a responsive "Separate Statement" of an astonishing 1,894 pages.

force as a matter of law, but held that the federal civil rights claim against the deputies was defeated by "qualified immunity," that is, that they reasonably *believed* that the force used was reasonable. On the same basis, it granted summary adjudication of this claim in favor of defendant County. Plaintiff sought review, authorized by Code of Civil Procedure section 437c, subdivision (m)(1). We conclude that the ruling in favor of defendant County was correct, although not for the reason given by the trial court, but that the ruling with respect to the deputies must be reversed.

STATEMENT OF FACTS

Plaintiff alleges that he was a resident at Epsilon Residential Home, a facility for "developmentally disabled adults." On the date in question, an employee at the home called the sheriff's department to report that plaintiff was acting irrationally and had assaulted staff, had recently been hospitalized and was weak, and needed treatment.[3]

When the defendant deputies arrived, plaintiff either resisted or was simply uncooperative; this much is in dispute.[4] Defendants' evidence tended to show that

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[3] Our recitation of these "facts" is gleaned from those portions of defendants' "Separate Statement" that were at least implicitly admitted by plaintiff. For example, with respect to the "fact" that it was reported that plaintiff had assaulted an employee, plaintiff responds (in addition to objections) that the statement is "disputed" because the employee "*also* told the dispatcher that Plaintiff had been in the hospital for pneumonia, was weak and had not eaten, and needed medical attention." (Italics added.) This in effect admits that the caller did say that plaintiff had assaulted someone.

[4] Plaintiff did not in fact directly rebut the evidence deriving from the deputies' declarations, but merely challenged their veracity and criticized their attempts to communicate with plaintiff. Plaintiff also argued in response to the "material facts" that the deputies' initial reports omitted any reference to force, and that they supplemented their reports to admit the use of some force only after they learned of plaintiff's claim.

plaintiff was lying in bed when they arrived and refused to expose his hands, at least one of which was concealed beneath his body. When asked if he would fight the deputies if they touched him, plaintiff responded, "Yes." Eventually, the deputies grabbed plaintiff's legs and then his left hand, but he continued to respond, "No" to demands that he release his right hand. One deputy climbed onto the bed, but there was concern that plaintiff was "trapping" one of the deputies.[5] At this point one deputy provided "4-5 distraction blows to Plaintiff's right side . . . around the hip area, using his right knee."

Eventually, the deputies were able to handcuff plaintiff for transport to a hospital. Plaintiff rolled onto the floor of the backseat. He refused repeated requests to get up and was eventually lifted out.

[5] The detailed choreography of the encounter described in the "material facts" is remarkable for the photographic recollection it reflects.

It is not disputed that the deputies applied a certain amount of force. Plaintiff also provided medical evidence that he suffered several broken ribs, as well as spiral fractures to his upper arms and shoulder dislocations.[6]

DISCUSSION

The rules governing our review of an order granting summary adjudication are well known and may be briefly summarized. Our review is de novo, and we review the evidence in the light most favorable to the nonmoving party (that is, plaintiff here). We accept the truth of all the evidence set forth by the parties except that to which objections were properly sustained, and we resolve doubts or ambiguities also in favor of the nonmoving party (plaintiff). (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1196.) We may also uphold an order if it was correct on any legal ground urged by the parties, because we review the ruling of the trial court and not its reasons. (*Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1092.)

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[6] Defendants argue that the medical records on which the claim of injuries and causation were in part based were not properly authenticated or brought before the court, citing *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 742-743 (*Garibay*). Although defendants made numerous evidentiary objections below, including objections to the injury/causation declarations submitted by Paul Woody and Eugene Vanderpol, these objections did not cite *Garibay*. In our view it is doubtful whether an objection that merely recites that a specified paragraph "lack[s] foundation, [is] based on speculation, and contain[s] expert opinion that the declarant is not qualified to render" or "lacks foundation, is conclusory, and is based on speculation" adequately directs the attention of a beleaguered trial court to the specific concerns dealt with in *Garibay*. More importantly, the trial court overruled all the objections as untimely so the issue is simply moot.

A.

The Civil Rights Cause of Action as to the Deputy Defendants[7]

Again, without going into excessive detail, the individual deputies' motion was based on the position that any force that they used was "reasonable" to subdue plaintiff so that he could be transported to a hospital. As noted *ante*, the trial court found that, in light of all of the evidence, there was a triable issue as to whether the force used (which included several so-called "knee strikes") was reasonable. We agree.

With respect to the federal civil rights claim, however, the individual deputies also argue that they were entitled to "qualified immunity," which arises when a public official or employee acts with objective reasonableness. The latter term is, in turn, construed to apply when the conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818.) The doctrine protects public employees such as police officers from being sued for good faith misjudgments when operating in gray areas, such as determining the amount of force which is appropriate in any given situation. (*Saucier v. Katz* (2001) 533 U.S. 194, 206 (*Saucier*).) *Saucier* instructed courts first to determine whether the facts alleged by plaintiff would constitute a constitutional violation; if the

[7] In their return, defendants argue that any claim with respect to negligent training, hiring, supervision, or retention has been waived because plaintiff does not challenge the trial court's ruling summarily adjudicating his negligence cause of action based on such allegations. Of course we agree, and as defendants point out, plaintiff does not even *attempt* to revive this cause of action, no doubt realizing that it is untenable under California law. (*de Villiers v. County of San Diego* (2007) 156 Cal.App.4th 238, 255-256.) However, the lack of any such viable claim under state law is irrelevant to the analysis of liability under federal civil rights law.

answer is "Yes," the court then was to proceed to determine the reasonableness of the conduct—whether it should have been clear to the defendant that a right was being violated. (*Saucier* at pp. 201-202; see also *Asociasion De Periodistas De Puerto Rico v. Mueller* (1st Cir. 2012) 680 F.3d 70, 81-82.) To the extent that this process was mandatory, *Saucier* has been overruled and courts may now examine the prongs of the problem in whatever order seems most expeditious. (*Pearson v. Callahan* (2009) 555 U.S. 223, 236.)

However, in this case the *Saucier* procedure is reasonable because the determination of whether plaintiff has alleged and supported his claim of a constitutional violation is easy. He has. The evidence shows that he was at most passively resistant and his injuries were substantial and arguably necessarily the result of considerable force. The United States Supreme Court has noted that although minor injury does not necessarily reflect minimal or lawful force, the extent of injury is relevant to determining the nature of the force applied. (*Wilkins v. Gaddy* (2010) ___U.S.___, [130 S.Ct. 1175, 1178].) Here, the nature of plaintiff's injuries is reasonable evidence that considerable force was applied, and the deputies' professed belief that he might be dangerous is not conclusively persuasive.

The second question then is whether the deputies should have realized that the force used was unconstitutionally severe. The trial court's view was that because plaintiff did not cry out or complain, and allegedly asked for a hamburger when he

arrived at the hospital,[8] the conclusion that the deputies would not reasonably have understood that they used excessive force naturally and inevitably follows. We disagree.

First, plaintiff's demeanor at the time he reached the hospital is completely irrelevant to the question of whether excessive force was applied *at the time* either at the care facility or when plaintiff was removed from the police vehicle at the hospital. Secondly, we cannot take seriously an argument, which, if followed to its natural conclusion, would allow a police officer to continue to use increasing force until the person sobbed for mercy—which would, in effect, tie the constitutional evaluation of excessive force to the stoicism of a particular plaintiff. Finally, as plaintiff stressed below (over and over), he is developmentally disabled and suffers from mental illness. At this stage of the proceedings, it is inappropriate to assume that a person with plaintiff's mental issues would respond to painful stimuli in any predictable manner; nor would it have been reasonable, as a matter of law, for the deputies to have so assumed. Nor can it be said that his failure to protest gave the deputies the *imprimatur* to continue to administer blows sufficient to break bones. Accordingly, we conclude that defendants did *not* carry their burden of establishing either that the force used was reasonable in the circumstances or that they had no reason to suspect that they were violating plaintiff's constitutional rights. The trial court erred in granting summary adjudication of the eighth cause of action to the four participant deputies.

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[8] Plaintiff did not expressly contest these "facts," evidently because his personal recollection is either nonexistent, unreliable, or unrecoverable.

B.

The Civil Rights Claim as to Defendant County

The trial court also granted summary adjudication on the civil rights cause of action as to defendant County, reasoning that the County could not be liable where the deputies were entitled to immunity. Although as explained *ante* we hold that the individual deputies did not establish their entitlement to rely on qualified immunity, the ruling as to defendant County was correct on another basis.

Contrary to plaintiff's strenuous assertions,[9] the complaint simply does not set out a federal civil rights claim against defendant County as authorized by *Monell v. Dept. of Soc. Serv. of City of N.Y.* (1978) 436 U.S. 658 (*Monell*). Under the holding in that case, a plaintiff may pursue a cause of action under section 1983 against a municipality only if the plaintiff can establish that the constitutional violation of which he complains was the result of an official policy, practice, or custom. (*Monell*, at pp. 690-694.) Plaintiff's complaint contains no such allegations. The best plaintiff can say is that he alleges that the individual deputies acted "under the color of the law" and that they acted "with the power and authority vested in them as officers. . . ." Although the eighth cause of action is *captioned* as being based on section 1983, it contains nothing whatsoever relating to any "custom, practice, or policy." However, because defendants elected to present

[9] Despite this insistence, he eventually admits that the critical allegations "could certainly have been pled with greater specificity . . . ."

evidence that rebutted a *proper* federal civil rights claim, we do not rely on the pleading defects.[10]

Defendants presented detailed declarations by the deputy defendants regarding their training with respect to the use of force and dealing with mentally ill or disabled persons. Copies of training manuals and materials were also presented. Sergeant Andy Stonebreaker, who supervises the Riverside County Defensive Tactics Unit at the sheriff's training center, also executed a declaration that confirmed that all deputies are trained on use of force generally and on strategies of dealing with and the laws relating to mentally ill or disabled persons. He also declared that the County has no policy, practice, or custom of allowing the use of unreasonable force on any persons.

Plaintiff's responses to the "undisputed material facts" supported by this evidence contain a series of points and assertions that fall into several categories and do not materially differ from one "fact" to the next. First, each[11] response contains the objection that the "material fact" as stated was "vague, ambiguous, incomplete, misleading and compound."[12] Next, the responses relating to Sergeant Stonebreaker's declaration

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[10] If the matter were ruled on as one merely of defective pleading, plaintiff could seek leave to amend, and as defendants are obviously aware of his intentions, the request would likely be a formality. (See *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 421-422.) Hence, although defendants did present "undisputed facts" concerning the failure to plead a section 1983 claim (a position with which we agree), we deal with the issue on the merits.

[11] We believe, although it is possible that our review of the dozens of facts and hundreds of pages might have missed an instance in which this was omitted.

[12] One might ask how a statement could be both incomplete and compound.

challenged his qualifications in numerous respects. However, even if it is true as plaintiff argued, that Sergeant Stonebreaker does not personally teach all the listed courses; does not personally perform background checks; has not worked patrol since 2004; and, does not supervise patrol deputies, we do not think this affects his qualifications to set out what training is received and what general policies regarding force and mentally disabled persons exist.

Next, plaintiff persistently relies on his claim that the deputies' version of events is false and that excessive force *was* applied. This is irrelevant to the question of whether defendant County had a custom, practice, or policy of encouraging such force. Nor is the possibility that the training provided to the deputies did not "stick" relevant without evidence that County was aware that its deputies were undertrained. Insofar as plaintiff argues that the fact that excessive force was applied is proof of inadequate training, we do not consider this sufficient to raise a triable issue of fact. Plaintiff did not, for example, provide evidence from other law enforcement personnel recommending additional forms of training or point out deficiencies in the written materials submitted by defendants. Certainly in the absence of any such evidence or opinion, the fact (if it be a fact) that the training given did not prevent the use of excessive force in this case cannot be permitted to establish causation—that is, that inadequate training was given. (See *Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1116-1117 [explaining why the occurrence of an assault on commercial premises cannot be used to prove that security measures on the premises were inadequate].)

In the context of section 1983 litigation, a plaintiff's reliance on a theory of negligent or inadequate training has been called the "most tenuous" basis for imposing liability on a municipality. (*Connick v. Thompson* (2011) ___U.S. ___, [131 S.Ct. 1350, 1359] (*Connick*).) There will be no municipal liability unless the failure to train is egregious enough to demonstrate conscious indifference to the risk of constitutional deprivations due to the inadequate training. (*Id*. at pp. 1360, 1365.) It must be shown that it is highly predictable that actionable errors will be made in the absence of more or different training. (*Id*. at p. 1365.) Plaintiff has not even approached this standard.

Plaintiff then repeatedly describes his own injuries and speculates that defendant deputies abused him because they believed he would not be able to articulate any complaints against them; the speculative nature of this is obvious, and, in any event once again, it is wholly irrelevant to any "custom, practice, or policy" analysis. Plaintiff also asserts that the deputies did not report the use of force until a complaint was in fact filed on plaintiff's behalf; if anything, this would only support the inference that they believed their conduct was inappropriate and would be disapproved. Although plaintiff states that "The initial reports [failing to mention the injuries or force] . . . evidence a department-wide custom and practice of concealing material facts and/or false reporting," this is a logical non sequitur.[13]

[13] Plaintiff also argues that inadequate training in preparing reports to reflect the use of force evidences an actionable policy of indifference to the use of force. Again, we disagree, and plaintiff has not, in fact, shown that the training with respect to preparing reports was in any way inadequate.

It is well established that a single act of wrongdoing by a nonpolicymaking employee will not support a section 1983 claim. (See, e.g., *McDade v. West* (9th Cir. 2000) 223 F.3d 1135, 1141; cf. *Pembaur v. City of Cincinnati* (1986) 475 U.S. 469, 481 [recognizing "single act" liability where the actor is a policy decision maker].) To the extent that plaintiff submitted evidence that the deputies were not instructed about the specific injuries that might result from specific errors in applying certain controlling force, this is not significant unless the deputies were also improperly instructed on the basic mechanics of overcoming resistance. None of this creates a triable issue as to the adequacy of the training, especially under the strict standard explained in *Connick*, *supra*, 131 S.Ct. 1350.

Plaintiff also complains that the detectives assigned to investigate his complaint disregarded evidence that the injuries were inflicted by defendants in concluding that they were accidental. Once again this simply does not establish any kind of official custom or policy even if plaintiff's premise is correct. It establishes nothing more than one compound instance of wrongdoing by individuals who do not set policy. We agree that the failure to discipline rogue employees may constitute evidence of a section 1983 violation *if* there is also evidence of previous failures to investigate or discipline, or possibly even of subsequent indifference to an incident involving clear violations with respect to a number of victims. (See, e.g., *Henry v. County of Shasta* (9th Cir. 1997) 132 F.3d 512, 518 [plaintiff, cited for a traffic violation, alleged that arresting officers refused to honor his request to be taken before a magistrate (Veh. Code, § 40302) and placed him, naked, in a padded cell on "suicide watch"; evidence of similar treatment of similar

citees after plaintiff filed his lawsuit was evidence of indifference to the potential for repeated violations].) But, in this case, there is *one* alleged violation, which apparently did not result in discipline. Plaintiff may not bootstrap himself into a showing of "policy, custom, or practice" in this manner. It is also logically difficult to see how action, or inaction, on the part of public entity on Date A can establish that officers acted in pursuance to a "policy, custom, or practice" on Date B, several months previously! (See *Long v. City and County of Honolulu* (D. Hawaii 2005) 378 F.Supp.2d 1241, 1248.)

In short, defendants presented sufficient evidence to demonstrate that the individual deputies received adequate training and that there was no official policy, practice, or custom on the part of County that either authorized or tacitly accepted the use of unreasonable force on individuals encountered by law enforcement. By establishing a prima facie case that it had committed no civil rights violation, defendant County therefore shifted the burden to plaintiff to produce at least a modicum of evidence tending to show otherwise. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; *Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, 353.) Plaintiff, however, provided only argument and speculation to support any claim qualifying under *Monell* and *Connick*. The municipality defendants were entitled to summary adjudication of the claim and the trial court's ruling was correct. The trial court erred in granting summary adjudication of the eighth cause of action to the four participant deputies. Petitioner's other claims and legal theories for recovery, of course, are unaffected by this decision.

DISPOSITION

The petition for writ of mandate is granted in part and denied in part. Let a peremptory writ of mandate issue, directing the Superior Court of Riverside County to vacate its order granting summary adjudication in favor of the participant defendant deputies, and to enter a new order denying the motion in respect of these defendants. In all other respects the petition is denied.

Upon the finality of this opinion, the previously ordered stay shall be lifted. As neither party prevailed on all issues, in the interests of justice the parties shall bear their own costs.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

KING
J.